

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JASON BRIAN SMITH,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,¹

Defendant.

No. 2:21-cv-0412 DB

ORDER

This social security action was submitted to the court without oral argument for ruling on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment.² Plaintiff's motion asserts that the Administrative Law Judge erred in several respects, including at step two of the sequential evaluation, in evaluating the medical opinion evidence, in rejecting plaintiff's testimony, and at step five of the sequential evaluation.

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¹ After the filing of this action Kilolo Kijakazi was appointed Acting Commissioner of Social Security and has, therefore, been substituted as the defendant. See 42 U.S.C. § 405(g) (referring to the "Commissioner's Answer"); 20 C.F.R. § 422.210(d) ("the person holding the Office of the Commissioner shall, in his official capacity, be the proper defendant").

² Both parties have previously consented to Magistrate Judge jurisdiction over this action pursuant to 28 U.S.C. § 636(c). (See ECF No. 10.)

1 For the reasons explained below, plaintiff's motion is granted, the decision of the
2 Commissioner of Social Security ("Commissioner") is reversed, and the matter is remanded for
3 further proceedings.

4 **PROCEDURAL BACKGROUND**

5 On April 16, 2019, plaintiff filed an application for Disability Insurance Benefits ("DIB")
6 under Title II of the Social Security Act ("the Act"), alleging disability beginning on April 16,
7 2019. (Transcript ("Tr.") at 15, 179-82.) Plaintiff's alleged impairments included lower back
8 issues, ulcers, and bipolar disorder. (Id. at 212.) Plaintiff's application was denied initially, (id.
9 at 89-92), and upon reconsideration. (Id. at 95-99.)

10 Plaintiff requested an administrative hearing and a hearing was held before an
11 Administrative Law Judge ("ALJ") on October 20, 2020. (Id. at 32-59.) Plaintiff was
12 represented by a non-attorney representative and testified at the administrative hearing. (Id. at 15,
13 32-39.) In a decision issued on December 8, 2020, the ALJ found that plaintiff was not disabled.
14 (Id. at 25.) The ALJ entered the following findings:

- 15 1. The claimant meets the insured status requirements of the Social
16 Security Act through December 31, 2024.
- 17 2. The claimant has not engaged in substantial gainful activity
18 since April 16, 2019, the alleged onset date (20 CFR 404.1571 *et
seq.*).
- 19 3. The claimant has the following severe impairments: right
20 acromioclavicular osteoarthritis; thoracolumbar degenerative disc
21 disease (DDD) with radiculopathy and post-laminectomy
22 syndrome; gastroesophageal reflux disease (GERD); chronic gastric
23 ulcer; a tremor disorder of the head and bilateral upper extremities;
24 anxiety disorder; bipolar disorder; and a neurocognitive disorder.
25 (20 CFR 404.1520(c)).
- 26 4. The claimant does not have an impairment or combination of
27 impairments that meets or medically equals the severity of one of
28 the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1
 (20 CFR 404.1520(d), 404.1525, and 404.1526).
- 29 5. After careful consideration of the entire record, I find that the
30 claimant has the residual functional capacity to lift and carry 10
31 pounds occasionally and less than 10 pounds frequently and to
32 stand and/or walk for approximately 4 hours and sit for
33 approximately 4 hours, in an 8-hour workday, with normal breaks,
34 with the following additional limitations. He cannot climb ladders,
35 ropes, and scaffolds and can occasionally climb stairs and ramps.

1 He can occasionally push and pull with the bilateral upper
2 extremities, balance, stoop, kneel, and crouch. He cannot crawl.
3 He can frequently handle and finger bilaterally. He should have no
4 exposure to extreme cold, vibrations, moving mechanical parts, and
high, exposed-place hazards, as rated by the Dictionary of
Occupational Titles (DOT). He can understand, remember, and
carry out simple, routine, and repetitive instructions and tasks.

5 6. The claimant is unable to perform any past relevant work (20
CFR 404.1565).

7 7. The claimant was born [in] 1975 and was 43 years old, which is
defined as a younger individual age 18-49, on the alleged disability
onset date (20 CFR 404.1563).

8 8. The claimant has at least a high school education. (20 CFR
404.1564).

9 10. Transferability of job skills is not material to the determination
11 of disability because using the Medical-Vocational Rules as a
framework supports a finding that the claimant is “not disabled,”
whether or not the claimant has transferable job skills (See SSR 82-
41 and 20 CFR Part 404, Subpart P, Appendix 2).

11 13. Considering the claimant’s age, education, work experience,
14 and residual functional capacity, there are jobs that exist in
significant numbers in the national economy that the claimant can
perform. (20 CFR 404.1569 and 404.1569(a)).

12 15. 11. The claimant has not been under a disability, as defined in the
16 Social Security Act, from April 16, 2019, through the date of this
decision (20 CFR 404.1520(g)).

17 (Id. at 17-25.)

18 On January 21, 2021, the Appeals Council denied plaintiff’s request for review of the
19 ALJ’s December 8, 2020 decision. (Id. at 1-5.) Plaintiff sought judicial review pursuant to 42
20 U.S.C. § 405(g) by filing the complaint in this action on March 8, 2021. (ECF No. 1.)

21 **LEGAL STANDARD**

22 “The district court reviews the Commissioner’s final decision for substantial evidence,
23 and the Commissioner’s decision will be disturbed only if it is not supported by substantial
24 evidence or is based on legal error.” Hill v. Astrue, 698 F.3d 1153, 1158-59 (9th Cir. 2012).
25 Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to
26 support a conclusion. Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Sandgathe v.
27 Chater, 108 F.3d 978, 980 (9th Cir. 1997).

[A] reviewing court must consider the entire record as a whole and may not affirm simply by isolating a ‘specific quantum of supporting evidence.’” Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006) (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)). If, however, “the record considered as a whole can reasonably support either affirming or reversing the Commissioner’s decision, we must affirm.” McCartey v. Massanari, 298 F.3d 1072, 1075 (9th Cir. 2002).

7 A five-step evaluation process is used to determine whether a claimant is disabled. 20
8 C.F.R. § 404.1520; see also *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). The five-step
9 process has been summarized as follows:

Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.

12 Step two: Does the claimant have a “severe” impairment? If so, proceed to step three. If not, then a finding of not disabled is appropriate.

14 Step three: Does the claimant's impairment or combination of
15 impairments meet or equal an impairment listed in 20 C.F.R., Pt. 404,
Subpt. P, App. 1? If so, the claimant is automatically determined
disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.

18 Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled.

²⁰ Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

21 The claimant bears the burden of proof in the first four steps of the sequential evaluation
22 process. Bowen v. Yuckert, 482 U.S. 137, 146 n. 5 (1987). The Commissioner bears the burden
23 if the sequential evaluation process proceeds to step five. *Id.*; Tackett v. Apfel, 180 F.3d 1094,
24 1098 (9th Cir. 1999).

APPLICATION

Plaintiff's pending motion asserts the following seven principal claims: (1) the ALJ's treatment of the medical opinion evidence was erroneous; (2) the ALJ erred at step five of the sequential evaluation; (3) the ALJ engaged in "cherry-picking"; (4) the ALJ erred at step two of

1 the sequential evaluation; (5) the ALJ erred at step three of the sequential evaluation; (6) the ALJ
2 failed to provide a clear and convincing reason for rejecting plaintiff's testimony; and (7) the
3 ALJ's residual functional capacity determination was erroneous.³ (Pl.'s MSJ (ECF No. 15) at 10-
4 31.⁴)

5 **I. Medical Opinion**

6 Plaintiff argues that the ALJ erred by rejecting the opinion of Psychiatric Physician's
7 Assistant ("PA"), Lacey Townsend. (*Id.* at 17-18.) For claims filed prior to March of 2017,
8 Ninth Circuit's precedent established a hierarchy for medical opinions based on the physician's
9 relationship to the plaintiff. See Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995) ("Cases in this
10 circuit distinguish among the opinions of three types of physicians: (1) those who treat the
11 claimant (treating physicians); (2) those who examine but do not treat the claimant (examining
12 physicians); and (3) those who neither examine nor treat the claimant (nonexamining
13 physicians)."). In 1991, the Commissioner promulgated regulations consistent with the Ninth
14 Circuit's hierarchy. See 56 Fed. Reg. 36932-01, 1991 WL 142361 (Aug. 1, 1991).

15 On March 27, 2017, however, revised Social Security Administration regulations went
16 into effect regarding the evaluation of medical opinions. Pursuant to those regulations, "the
17 Commissioner 'will no longer give any specific evidentiary weight to medical opinions; this
18 includes giving controlling weight to any medical opinion.'" V.W. v. Comm'r of Soc. Sec., No.
19 18-cv-07297-JCS, 2020 WL 1505716, at *13 (N.D. Cal. Mar. 30, 2020) (quoting 20 C.F.R. §
20 416.920c(a)); see also 20 C.F.R. § 404.1520c(a). In place of specific evidentiary weight, the
21 Commissioner will "evaluate the persuasiveness of medical opinions" based on (1) supportability;
22 (2) consistency; (3) relationship with the claimant; (4) specialization; and (5) other factors, such
23 as "evidence showing a medical source has familiarity with the other evidence in the claim or an
24 understanding of our disability program's policies and evidentiary requirements." 20 C.F.R. §
25 404.1520c(a), (c)(1)-(5), § 416.920c(a), (c)(1)-(5).

26 _____
27 ³ The court has reordered plaintiff's claims for the sake of clarity and efficiency.
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⁴ Page number citations such as this one are to the page number reflected on the court's CM/ECF
system and not to page numbers assigned by the parties.

1 While the ALJ will consider all of the above factors, “the ALJ must explain how he
2 considered the two ‘most important factors’—supportability and consistency.” Crystal R. E. v.
3 Kijakazi, Case No. 20-cv-0319 SH, 2022 WL 446023, at *6 (N.D. Okla. Feb. 14, 2022) (quoting
4 20 C.F.R. § 404.1520c(b)(2)). Supportability concerns how “relevant the objective medical
5 evidence and supporting explanations presented by a medical source are[.]” 20 C.F.R. §
6 404.1520c(c)(1). The more relevant evidence and support presented “the more persuasive the
7 medical opinion[] . . . will be.” (Id.) With respect to consistency, “[t]he more consistent a
8 medical opinion[] . . . is with the evidence from other medical sources and nonmedical sources . .
9 . the more persuasive the medical opinion . . . will be.” (Id.)

10 In this regard, the new regulations “still require that the ALJ provide a coherent
11 explanation of [her] reasoning,” and establish “a minimum level of articulation to be provided in
12 determinations and decisions, in order to provide sufficient rationale for a reviewing adjudicator
13 or court.” Hardy v. Commissioner of Social Security, 554 F.Supp.3d 900, 906 (E.D. Mich.
14 2021). Thus,

15 [even under the new regulations, an ALJ cannot reject an examining
16 or treating doctor’s opinion as unsupported or inconsistent without
17 providing an explanation supported by substantial evidence. The
18 agency must “articulate . . . how persuasive” it finds “all of the
19 medical opinions” from each doctor or other source, 20 C.F.R. §
20 404.1520c(b), and “explain how [it] considered the supportability
21 and consistency factors” in reaching these findings, id §
22 404.1520c(b)(2).]

23 Woods v. Kijakazi, 32 F.4th 785, 792 (9th Cir. 2022).

24 Here, on November 23, 2020, PA Townsend completed a Mental Impairment
25 Questionnaire. (Tr. at 749-53.) Therein, Townsend stated that plaintiff had been treated for
26 bipolar disorder which caused “mood dysregulation,” “sleep difficulties,” “intermittent explosive
27 anger outbursts,” and “difficulty following directions even when written down.” (Id. at 749.)
28 Townsend also identified over two dozen signs and symptoms plaintiff experienced, including
decreased energy, difficulty concentrating, paranoid thinking, hyperactivity, pressured speech,
short term memory impairment, and persistent irrational fear. (Id. at 750.) Townsend then
opined that plaintiff would be either unable to meet competitive standards or have no useful

1 ability with respect to various mental abilities and aptitudes needed to do unskilled work. (Id. at
2 751.)

3 The entirety of the ALJ's discussion of PA Townsend's opinion was as follows:

4 The opinion of Lacey Townsend, PA, one of the claimant's own
5 medical sources, was unpersuasive. PA Townsend provides little in
6 the way of support for her extreme set of proposed limitations.
7 Moreover, her opinion is inconsistent with the evidentiary
considerations discussed below in the explanation of the mental
component of my residual functional capacity assessment, and above
in the assessment of the paragraph B criteria.

8 (Id. at 23.)

9 This analysis is woefully inadequate. There is no discussion of either the opinion's
10 supportability or consistency. The ALJ did not even cite to—let alone discuss—evidence in
11 support of the ALJ's assertion. Instead, the ALJ attempts to rely entirely on the vague and
12 conclusory reference to the ALJ's opinion “below” and “above.” (Id.)

13 “Judges are not like pigs, hunting for truffles buried in” the evidence of record to find
14 support for the ALJ's decision. U.S. v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991). Nor can the
15 court speculate as to what the ALJ may have been thinking. See Bray v. Commissioner of Social
16 Security Admin., 554 F.3d 1219, 1225 (9th Cir. 2009) (“Long-standing principles of
17 administrative law require us to review the ALJ's decision based on the reasoning and factual
18 findings offered by the ALJ—not post hoc rationalizations that attempt to intuit what the
19 adjudicator may have been thinking.”).

20 An ALJ must provide “an ‘adequate discussion’” of the ALJ's persuasiveness explanation,
21 which “enables the court to undertake a meaningful review of whether his finding with regard to
22 the particular medical opinion was supported by substantial evidence . . . and does not require
23 the Court to merely speculate about the reasons behind the ALJ's persuasiveness finding or lack
24 thereof.” Cooley v. Commissioner of Social Security, 587 F.Supp.3d 489, 499 (S.D. Miss. 2021).

25 The regulations are clear and imperative in defining the mode of
26 analysis. All medical sources are to be considered, and a rationale
27 articulating how the ALJ applied the factors specified in the
regulations must be stated for each source. . . . The administrative
28 adjudicator has the obligation in the first instance to show his or her
work, i.e., to explain in detail how the factors actually were applied
in each case, to each medical source.

1 Hardy, 554 F.Supp.3d at 909; see also Loucks v. Kijakazi, 21-1749, 2022 WL 2189293, at *2
2 (2nd Cir. 2022) (“the ALJ committed procedural error by failing to explain how it considered the
3 supportability and consistency of medical opinions in the record”); Dogan v. Kijakazi, Civil
4 Action No. 6:21-3291 RMG, 2022 WL 4092461, at *4 (D. S.C. Sept. 7, 2022) (“where . . . there
5 is significant record evidence supporting Plaintiff’s claim of disability and the regulation requires
6 the ALJ to consider all of the factors under 404.1520c(c), the Court cannot confirm that this was
7 actually done without the ALJ confirming he considered all five factors set forth in § 404.1520c
8 and explaining how he weighed those factors”).

9 Accordingly, plaintiff is entitled to summary judgment on the claim that the ALJ’s
10 treatment of PA Townsend’s opinion was erroneous.

11 **II. Step Five Error**

12 Plaintiff also argues that the ALJ erred at step five of the sequential evaluation. (Pl.’s
13 MSJ (ECF No. 15) at 29-31.) At step five, “the Commissioner has the burden ‘to identify specific
14 jobs existing in substantial numbers in the national economy that [a] claimant can perform despite
15 [his] identified limitations.’” Zavalin v. Colvin, 778 F.3d 842, 845 (9th Cir. 2015) (quoting
16 Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995) (alterations in original)). “To aid in
17 making this determination, the ALJ may rely on an impartial vocational expert to provide
18 testimony about jobs the applicant can perform despite his or her limitations.” Gutierrez v.
19 Colvin, 844 F.3d 804, 806-07 (9th Cir. 2016); see also Leach v. Kijakazi, 70 F.4th 1251, 1254
20 (9th Cir. 2023).

21 “When there is an apparent conflict between the VE’s testimony and the Dictionary of
22 Occupational Titles (‘DOT’)—for example, expert testimony that a claimant can perform an
23 occupation involving DOT requirements that appear more than the claimant can handle—the ALJ
24 is required to reconcile the inconsistency.” Zavalin, 778 F.3d at 846. When such a conflict exists
25 “the ALJ may not rely on the VE’s ‘evidence to support a determination or decision that the
26 individual is or is not disabled’ unless the ALJ explains ‘how he or she resolved the conflict.’”
27 Wischmann v. Kijakazi, 68 F.4th 498, 505 (9th Cir. 2023) (quoting SSR 00-4p, 65 Fed. Reg. at
28 75760).

1 Here, the VE testified that a hypothetical person with plaintiff's limitations could perform
 2 the jobs of "host, DOT #439.667-014," and "rental clerk, DOT #392.357-010." (Tr. at 25.) The
 3 DOT, however, states those jobs require a level 3 reasoning level, while the hypothetical question
 4 to the VE limited the person to "simple and routine work." (Tr. at 53.)

5 "The weight of authority in this circuit, including in this district, has concluded that a
 6 limitation to simple, repetitive tasks is inconsistent with the DOT's description of jobs requiring .
 7 . . reasoning Level 3." Celedon v. Colvin, No. 1:13-cv-0449 SMS, 2014 WL 4494507, at *9
 8 (E.D. Cal. Sept. 11, 2014); see also Hackett v. Barnhart, 395 F.3d 1168, 1176 (10th Cir. 2005)
 9 (limitation to simple and routine work "seems inconsistent with the demands of level-three
 10 reasoning"); Tich Pham v. Astrue, 695 F.Supp.2d 1027, n.7 1032 (C.D. Cal. 2010) (level 3
 11 reasoning "greater than the reasoning required for simple repetitive tasks"); Gottschalk v. Colvin,
 12 Civil No. 6:13-cv-0125-JE, 2014 WL 1745000, at *5 (D. Or. May 1, 2014) (majority of district
 13 courts within the Ninth Circuit have concluded that there is a conflict between limitation to
 14 simple, routine, repetitive work and level 3 reasoning); Torrez v. Astrue, No. 1:09-0626-JLT,
 15 2010 WL 2555847, at *9 (E.D. Cal. June 21, 2010) ("In light of the weight of authority in this
 16 circuit, the Court concludes that the DOT precludes a person restricted to simple, repetitive tasks,
 17 from performing work . . . that requires level three reasoning.").

18 The ALJ failed to reconcile this inconsistency. Defendant concedes that "the expert's
 19 testimony had some problems," but argues that the ALJ's reliance on the VE's testimony was
 20 harmless "because the expert testified to the existence of 45,000 jobs nationwide" as a counter
 21 clerk that plaintiff could perform. (Def.'s MSJ (ECF No. 19) at 26.) The VE's testimony,
 22 however, was muddled and confusing, at best.

23 In this regard, the VE identified DOT job 249.366-010, "counter clerk," as a job someone
 24 with plaintiff's limitations could perform. (Tr. at 55.) The DOT identifies the job of counter
 25 clerk as someone working in the photofinishing industry such as receiving "film for
 26 processing[.]" DICOT 249.366-010. The VE, however, testified that the VE's answer was
 27 actually a "composite counter clerk," that the VE was "just putting it under a general counter
 28 ////

1 clerk, retail, large, small, whatever in virtually any type of - - retail type of business shopper or
2 whatever.” (Tr. at 55.)

3 The demands of a “composite” job created by the VE, defined as “whatever in virtually
4 any type of retail type of business shopper or whatever” are entirely unknown to the court.
5 Presented with the VE’s vague and confusing answer, the court has no way of evaluating whether
6 the VE’s testimony conflicted with the DOT or the ALJ’s hypothetical. Accordingly, the court
7 finds that plaintiff is also entitled to summary judgment on this claim.

8 CONCLUSION

9 After having found error, “[t]he decision whether to remand a case for additional
10 evidence, or simply to award benefits[,] is within the discretion of the court.”⁵ Trevizo v.
11 Berryhill, 871 F.3d 664, 682 (9th Cir. 2017) (quoting Sprague v. Bowen, 812 F.2d 1226, 1232
12 (9th Cir. 1987)). A case may be remanded under the “credit-as-true” rule for an award of benefits
13 where:

14 (1) the record has been fully developed and further administrative
15 proceedings would serve no useful purpose; (2) the ALJ has failed to
16 provide legally sufficient reasons for rejecting evidence, whether
claimant testimony or medical opinion; and (3) if the improperly
discredited evidence were credited as true, the ALJ would be
required to find the claimant disabled on remand.

18 Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014).

19 Even where all the conditions for the “credit-as-true” rule are met, the court retains
20 “flexibility to remand for further proceedings when the record as a whole creates serious doubt as
21 to whether the claimant is, in fact, disabled within the meaning of the Social Security Act.” Id. at
22 1021; see also Dominguez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) (“Unless the district court
23

24 ⁵ Having already identified errors requiring remand, and upon review of plaintiff’s remaining
25 claims and the record, the court finds it unnecessary to reach plaintiff’s remaining claims of error.
See Janovich v. Colvin, No. 2:13-cv-0096 DAD, 2014 WL 4370673, at *7 (E.D. Cal. Sept. 2,
26 2014) (“In light of the analysis and conclusions set forth above, the court need not address
plaintiff’s remaining claims of error.”); Manning v. Colvin, No. CV 13-4853 DFM, 2014 WL
27 2002213, at *2 (C.D. Cal. May 15, 2014) (“Because the Court finds that the decision of the ALJ
must be reversed on the basis of the stooping limitation, the Court need not address Plaintiff’s
28 remaining contentions.”).

1 concludes that further administrative proceedings would serve no useful purpose, it may not
2 remand with a direction to provide benefits.”); Treichler v. Commissioner of Social Sec. Admin.,
3 775 F.3d 1090, 1105 (9th Cir. 2014) (“Where . . . an ALJ makes a legal error, but the record is
4 uncertain and ambiguous, the proper approach is to remand the case to the agency.”).

5 Here, given the nature of the ALJ’s errors—failing to properly consider medical opinion
6 evidence and failing to properly question the VE—the court cannot say that further administrative
7 proceedings would serve no useful purpose. This case, therefore, will be remanded for further
8 proceedings.

9 Accordingly, IT IS HEREBY ORDERED that:

- 10 1. Plaintiff’s motion for summary judgment (ECF No. 15) is granted;
11 2. Defendant’s cross-motion for summary judgment (ECF No. 19) is denied;
12 3. The Commissioner’s decision is reversed;
13 4. This matter is remanded for further proceedings consistent with the order; and
14 5. The Clerk of the Court shall enter judgment for plaintiff and close this case.

15 Dated: September 14, 2023



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17 DEBORAH BARNES
18 UNITED STATES MAGISTRATE JUDGE
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